CENTRAL TRUST COMPANY OF ILLINOIS, TRUSTEE OF FRANK E. SCOTT TRANSFER COMPANY, BANKRUPT, *v.* CHICAGO AUDITORIUM ASSOCIATION.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CHICAGO AUDITORIUM ASSOCIATION *v.* CENTRAL TRUST COMPANY, TRUSTEE, &c.

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Nos. 162, 174. Argued January 12, 1916.—Decided April 3, 1916.

Appeals from decisions of the Circuit Court of Appeals, allowing or rejecting a claim in bankruptcy, are, in the absence of the certificate prescribed by § 25b-2, limited under § 25b-1 to cases involving Federal questions of the kind described in § 237, Jud. Code.

S. C., 175 Fed. Rep. 312; besides which a number of cases arising out of the relation of landlord and tenant are cited: *In re Ellis*, 98 Fed. Rep. 967; *In re Pennewell*, 119 Fed. Rep. 139; *Watson* v. *Merrill*, 136 Fed. Rep. 359; *In re Roth & Appel*, 181 Fed. Rep. 667; *Colman Co.* v. *Withoft*, 195 Fed. Rep. 250. Cases of the latter class are distinguishable, because of the "diversity betweene duties which touch the realty, and the meere personalty." Co. Litt., 292, b, § 513.

The contract with which we have to deal was not a contract of personal service simply, but was of such a nature as evidently to require a considerable amount of capital, in the shape of equipment, etc., for its proper performance by the Transfer Company. The immediate effect of bankruptcy was to strip the company of its assets, and thus disable it from performing. It may be conceded that the contract was assignable, and passed to the trustee under § 70a (30 Stat. 565), to the extent that it had an option to perform it in the place of the bankrupt (see *Sparhawk* v. *Yerkes*, 142 U. S. 1, 13; *Sunflower Oil Company* v. *Wilson*, 142 U. S. 313, 322); for although there was a stipulation against assignment without consent of the Auditorium Association, it may be assumed that this did not prevent an assignment by operation of law. Still, the trustee in bankruptcy did not elect to assume performance, and so the matter is left as if the law had conferred no such election.

It is argued that there can be no anticipatory breach of a contract except it result from the voluntary act of one of the parties, and that the filing of an involuntary petition in bankruptcy, with adjudication thereon, is but the act of the law resulting from an adverse proceeding instituted by creditors. This view was taken, with respect to the effect of a state proceeding restraining a corporation from the further prosecution of its business or the exercise of its corporate franchises, appointing a receiver, and

dissolving the corporation, in *People* v. *Globe Ins. Co.*, 91 N. Y. 174, cited with approval in some of the Federal court decisions above referred to. In that case, it did not appear that the company was the responsible cause of the action of the State, so as to make the dissolution its own act; but, irrespective of this, we cannot accept the reasoning. As was said in *Rochm* v. *Horst*, 178 U. S. 1, 19: "The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due." Commercial credits are, to a large extent, based upon the reasonable expectation that pending contracts of acknowledged validity will be performed in due course; and the same principle that entitles the promisee to continued willingness entitles him to continued ability on the part of the promisor. In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement. It is the purpose of the Bankruptcy Act, generally speaking, to permit all creditors to share in the distribution of the assets of the bankrupt, and to leave the honest debtor thereafter free from liability upon previous obligations. *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, 554. Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the Act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in bankrupt estates, while the bankrupts themselves, as a necessary corollary, were left still subject to action for non-performance in the future, although without the property or credit often necessary to enable them to per-

form. We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement, within the doctrine of *Rochm* v. *Horst*, *supra*.

The claim for damages by reason of such a breach is "founded upon a contract, express or implied," within the meaning of § 63a-4, and the damages may be liquidated under § 63b. *Grant Shoe Co.* v. *Laird*, 212 U. S. 445, 448. It is true that in *Zavelo* v. *Reeves*, 227 U. S. 625, 631, we held that the debts provable under § 63a-4 include only such as existed at the time of the filing of the petition. But we agree with what was said in *Ex parte Pollard*, 2 Low. 411, Fed. Cas. No. 11,252, that it would be "an unnecessary and false nicety" to hold that because it was the act of filing the petition that wrought the breach, therefore there was no breach at the time of the petition. And as was also declared in *In re Pettingill*, 137 Fed. Rep. 143, 147: "The test of provability under the Act of 1898 may be stated thus: If the bankrupt, at the time of bankruptcy, by disenabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disenablement and repudiation. For the assessment of damages proceedings may be directed by the court under § 63b (30 Stat. 562)." It was in effect so ruled by this court in *Lesser* v. *Gray*, 236 U. S. 70, 75, where it was said: "If, as both the bankruptcy and state courts concluded, the contract was terminated by the involuntary bankruptcy proceeding, no legal injury resulted. If, on the other hand, that view of the law was erroneous, then there was a breach and defendant Gray became liable for any resulting damage; but he was released therefrom by his

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discharge." Of course, he could not be released unless the debt was provable.

We therefore conclude that the Circuit Court of Appeals was correct in holding that the intervention of bankruptcy constituted such a breach of the contract in question as entitled the Auditorium Association to prove its claim.

The denial of all damages except such as accrued within six months after the filing of the petition was based upon the ground that the contract reserved to the Association an option to revoke the privileges by giving six months' notice in writing of its election so to do, in which case both parties were to be released from further liability at the expiration of the six months. It was held that because of this the contract was mutually obligatory for that term only, and uncertain and without force for any longer term of service *in futuro*, within the ruling of this court in *Dunbar* v. *Dunbar*, 190 U. S. 340. In that case the contract was to pay to a divorced wife "during her life, or until she marries, for her maintenance and support, yearly, the sum of five hundred dollars"; and it was held that for instalments falling due after bankruptcy the husband remained liable, notwithstanding his discharge, on the ground that the wife's claim for such payments was not provable because of the impossibility of calculating the continuance of widowhood so as to base a valuation upon it. The court referred to the 1903 amendment of § 17 of the Bankruptcy Act (32 Stat. 797) relating to debts not affected by a discharge, and including among these a liability for alimony due or to become due for maintenance or support of wife or child. This, while enacted after the Dunbar suit was begun, and not applicable to it, was cited as showing the legislative trend in the direction of not discharging an obligation of the bankrupt for the support of his wife or children. The authority of that decision cannot be extended to cover

such a case as the present. Here the obligation of the bankrupt was clear and unconditional. The right reserved to the Auditorium Association to cancel and revoke the privileges was reserved for its benefit, not that of the grantee of those privileges. It does not lie in the mouth of the latter, or of its trustee, to say that its service would not be satisfactory, and there is no presumption that otherwise it would have been advantageous to the Association to exercise the option. It results that the decree, in so far as it limits the provable claim to a period of six months after the bankruptcy, must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

No. 162. Decree affirmed. No. 174. Appeal dismissed. certiorari allowed, and decree reversed.